

## **EXHIBIT "A"**

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-16167

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In the Matter of:

EAST 44TH REALTY, LLC,

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

March 10, 2006

10:12 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 HEARING re Docket #70; Motion to Assume Lease

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25 Transcribed by: Lisa Bar-Leib

A P P E A R A N C E S :

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1 EAST 44TH REALTY, LLC

2 P R O C E E D I N G S

3 THE COURT: Please be seated. All  
4 right. East 44th Street Realty.

5 MS. TRAKINSKI: Esther Trakinski,  
6 Davidoff, Malito for the debtor.

7 MR. BACKENROTH: Abraham Backenroth  
8 for the principal of the debtor.

9 MS. LIU: Judy Liu from Weil,  
10 Gotshal for the landlord.

11 MR. TOFEL: Lawrence Tofel, Tofel &  
12 Partners for the landlord.

13 THE COURT: Okay. I, obviously,  
14 received, since the last time we were  
15 here on the debtor's motion to assume the  
16 lease and the landlord's objection  
17 thereto, the citations to additional  
18 cases that counsel for the landlord --  
19 I'm sorry, the counsel for the debtor  
20 said she wanted to submit. And I gave  
21 her leave to submit, as well as the  
22 response by the landlord to those  
23 citations. I've also received some  
24 additional materials, some of which I  
25 wanted to receive, others that I didn't.

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I received additional materials in respect of the landlord's claim for attorneys' fees. I had asked for time records and the like. I got those. I also got supporting affidavits by Mr. Tofel in connection therewith. I also received an affidavit from Mr. Tofel regarding the landlord's attempts to mitigate damages, which we had discussed at the end of the hearing. I received this morning a courtesy copy of a response to that affidavit which I've only very briefly looked at since I got it this morning. And I have received correspondence back and forth with respect to the precondition that I had set for Mr. Tofel's deposition, which was that the debtor show me that in fact it had sufficient funds to make me comfortable that there was a reason to proceed on this matter, since I believed that there would have to be at least a reserve in respect to the assumption motion of, as I phrased it, a few hundred

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thousand dollars. Originally, it struck me that those representations were inadequate. I subsequently received an affidavit by the debtor's principal, Mr. Yesef Bildirici in which he swore under oath that the 300,000 dollars in the bank account that was referred to in the affidavit was (a) not the debtor's money and (b) dedicated solely to payment of cure costs and otherwise in connection with assumption of the lease. That happened only recently and I don't know whether Mr. Tofel has been deposed and where we stand at this point in terms of any further adversary evidentiary matter in this lease assumption matter. So maybe the parties can inform me of that.

MR. TOFEL: If I can, Your Honor.

I have not been deposed yet, and let me tell you exactly what the thought process was from our side of the table, at least.

THE COURT: All right.

MR. TOFEL: We were aware of the submission by Ms. Trakinski of a letter

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2 indicating two different potential  
3 sources of funding, one from an insider  
4 of the debtor and one from a home equity  
5 line. We also understood Your Honor to  
6 request more.

7 THE COURT: Right.

8 MR. TOFEL: There were two issues  
9 with respect to that. One, we did not  
10 understand Your Honor to have identified  
11 a number as Your Honor has observed was  
12 several hundred or a few hundred thousand  
13 dollars --

14 THE COURT: Right.

15 MR. TOFEL: And as we understand,  
16 at least, the submission, the last  
17 submission, the affidavit to which Your  
18 Honor referred, it does say what Your  
19 Honor said, but what it actually says is  
20 the money is there only if and it's there  
21 for the purposes that Your Honor  
22 indicated, but only if Your Honor caps  
23 the cure amount at 300,000 dollars or  
24 less. Thus, a somewhat longer response  
25 to we do not understand the Court yet to

1 EAST 44TH REALTY, LLC  
2 have determined whether the debtor has  
3 met Your Honor's inquiry or satisfied the  
4 Court's concerns and, obviously, we need  
5 some guidance on that. Obviously, we  
6 believe the amount of 300,000 dollars not  
7 only would be inadequate, but also  
8 inconsistent with Your Honor's prior  
9 rulings where Your Honor had said, I  
10 think back in December, perhaps in  
11 January, I don't want to see an arbitrary  
12 cut-off which would not account for  
13 expenditures in connection with these  
14 processes and these hearings. But, so --  
15 we need some guidance from Your Honor --

16 THE COURT: All right.

17 MR. TOFEL: --on that, but of  
18 course that also presupposes the gating  
19 issue, which is the termination issue.

20 THE COURT: Right.

21 MR. TOFEL: And then there are also  
22 some things that have happened more  
23 recently that I think Your Honor should  
24 be aware of since the hearing, not with  
25 respect to the filings, which we believe

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2 are further disregard of -- not only  
3 disregard, but also direct violation of  
4 this Court's prior orders.

5 THE COURT: All right. Well, in  
6 respect to the affidavit, I certainly  
7 recognize that I had left the amount  
8 vague in saying a few hundred thousand  
9 dollars. Partly, that was because I had  
10 not had the chance to review the fee  
11 information material that you  
12 subsequently gave me, and that's really  
13 particularly no one's fault. As I read  
14 this affidavit, however, it doesn't limit  
15 the amount that the debtor would pay as  
16 cure. And as I read it, it says that the  
17 full 300,000 dollars is there.  
18 Obviously, they're not going to pay  
19 300,000 dollars if I find the cure is  
20 200,000 dollars. On the other hand, if I  
21 find the cure is 350,000 dollars, they're  
22 going to have to come up with another  
23 50,000 dollars. And what I had in mind,  
24 really, was simply having some assurance  
25 that, based on the record of the prior

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hearing, the debtor in fact did have sufficient funds to continue to proceed in good faith. Because I believe that given all the issues here, including the issues regarding adequate assurance of future performance, it would have to come up with some real money. And, in my view, and I'll get into this in more detail later, having reviewed the fee and expense submissions and having gone back again and reviewed the law on attorneys' fees in connection with a cure claim and having again reviewed the lease provisions dealing with attorneys' fees, as well as Judge Diamond's order, for purposes of, if you will, continuing on with the motion and subjecting you to discovery, I think the 300,000 dollars is sufficient. That's not a ruling on what the cure amount is but I didn't want to create additional expense on your end if the debtor didn't have a good faith amount of money. So, that's how I view the affidavit.

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2 MR. TOFEL: That's fine. I just --  
3 I think it would be helpful at least from  
4 our perspective, and perhaps also from  
5 the Court's -- again we read that  
6 affidavit as saying that if Your Honor  
7 were to rule, to use your hypothetical,  
8 with the cure amount as 350, that there  
9 could be conditions with respect to the  
10 funds that are now in that bank account.  
11 It would make those funds not available.

12 THE COURT: Well, I don't know --

13 MR. TOFEL: The affidavit is very  
14 carefully written in terms of the money  
15 is there and available, conditioned upon  
16 or limited, if the Court were to find  
17 that the amount were not to exceed.

18 MR. BACKENROTH: Your Honor, if I  
19 can clarify.

20 THE COURT: I don't read it that  
21 way, but why don't we have the debtor's  
22 lawyer or Mr. Bildirici's lawyer --

23 MR. BACKENROTH: Yeah, but all it  
24 says, basically, is that he's committed  
25 the 300,000. It's there in escrow. If

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Your Honor ruled fine and say, according to your hypothetical, 350, then he'll have a decision to make. That decision is put up another 50,000 or walk away from the assumption obligation. In other words, he's committed 300,000, it's sitting in escrow. If Your Honor rules 250, it's 250, he gets paid absolutely, there's no issue, but if Your Honor rules more than that, then it's a moment of truth, so to speak. And he may lose the lease --

THE COURT: Right.

MR. BACKENROTH: -- if he doesn't put up the extra money. But that's our good faith basically.

THE COURT: All right. Okay.

MS. TRAKINSKI: If I can just add something from the debtor's perspective, Your Honor, that language and the intent of the language so that there is no misunderstanding that those funds belong to the equity shareholders, they are not the debtor's funds and in the event Your

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Honor rules that it's something less than 300,000, we want it to be perfectly clear that those funds were not available to be tapped for other obligations of the debtor, other than the cure of the attorneys' fees. And that's been purely the intent.

THE COURT: All right. So, I think everyone is in agreement that there is, I suppose, some risk that a deposition of Mr. Tofel and continued litigation of this matter would be wasting everyone's time, that is, if I find a greater cure amount and/or need for adequate assurance, and the shareholders decide not to put it up. On the other hand, 300,000 is a lot more than I thought, reasonably based on what I heard on the last hearing on the record, that perhaps the debtor was willing to pay, since everything on the record in the last hearing was trying to squeeze out every possible cent through set-offs and the like. And, again, as I said, I've

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2 reviewed the cure claim in more detail  
3 having received more detail, and I think  
4 that is a good faith basis to continue.

5 Now, I am prepared to address the  
6 issue of whether this is in fact an  
7 unexpired lease or whether in fact it was  
8 terminated pre-petition, but I guess  
9 before I do that, Mr. Tofel, you said you  
10 had something else that was relevant?

11 MR. TOFEL: Well, I know there are  
12 facts that have occurred since we were  
13 last before you that I think you should  
14 know you will decide whether --

15 THE COURT: But they don't pertain  
16 to this lease termination issue?

17 MR. TOFEL: They pertain to whether  
18 the debtor's complied with prior orders  
19 of this Court.

20 THE COURT: Okay. All right. But  
21 not at -- there's not been a further  
22 development, say, in the Appellate  
23 Division or in front of Judge Diamond or  
24 anything like that.

25 MR. TOFEL: No.

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2 THE COURT: All right. All right.

3 So I probably ought to deal with, then,  
4 what has been referred to from time to  
5 time as the gating issue, which is the  
6 issue of whether the debtor's lease,  
7 which is essentially its only asset other  
8 than its right to collect rent from the  
9 tenants, terminated pre-petition or  
10 perhaps, more specifically, and this is  
11 how the landlord has phrased it, whether  
12 the debtor lost the right to cure the  
13 default and pre-petition.

14 This is because, obviously,  
15 Section 365 of the Code applies only if  
16 the lease is in existence at the  
17 commencement of the case and has not  
18 otherwise expired -- of course it's not  
19 expired as it's a long term lease --  
20 since the commencement of the case.

21 As Collier says at 3 Collier on  
22 Bankruptcy, paragraph 365.02[2], if the  
23 contract or lease has expired by its own  
24 terms or has been terminated under  
25 applicable law before the commencement of

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the bankruptcy case, there is nothing left for the trustee to assume or assign. However, the termination process must actually be completed and not be subject to reversal, a determination that will require reference to applicable state law. As the parties may recall from the last hearing, most of the last hearing was dedicated to argument with respect to whether the lapse of time between the issuance of a decision and order by Judge -- or Justice -- Diamond on February 24, 2005, lifting her Yellowstone injunction, after which the landlord went through the notice and termination procedure provided for under the lease, which the landlord contends resulted in an effective termination on March 31, 2005, was vitiated or mooted by the subsequent issuance of a stay pending appeal by the Appellate Division in an order dated May 6, I believe, of 2005. That stay by the Appellate Division remained in place through the date of the commencement of

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2 this Chapter 11 case. Fairly early on in  
3 the Chapter 11 case, the Court lifted the  
4 automatic stay to permit the conclusion  
5 of the litigation of the appeal in front  
6 of the Appellate Division, but of course  
7 not beyond the issuance of a decision by  
8 the Appellate Division. That is, not to  
9 the point of enforcement.

10 On December 15th, 2005, the  
11 Appellate Division determined that the  
12 substantive portion of Judge Diamond's --  
13 Justice Diamond's, excuse me -- February  
14 24, 2005 order should be upheld and that  
15 in fact the debtor had an obligation to  
16 cure the default in respect of the lease  
17 which was the subject of her order. That  
18 is, to make the repairs to the building.  
19 It's, I believe, acknowledged by the  
20 parties that those repairs and that work  
21 have been substantially completed and  
22 that to finish the work in the grand  
23 scheme of this case would cost a  
24 relatively small amount of money.

25 The Appellate Division's December

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2005 order said nothing, as it would not be expected of the Appellate Division to say anything, regarding the issue before me, which is, did its earlier May 2005 order effectively toll retroactively the debtor's right to cure that default if, as happened, the Appellate Division ruled against the debtor on the merits in respect of the existence of the default. The landlord contends that no such right to cure exists and, effectively, that the stay was intended only to preserve the lease if in fact the debtor prevailed and convinced the Appellate Division that there was no default and that Justice Diamond was incorrect on the merits. On the other hand, the debtor and its principal contend that the Appellate Division's stay had the effect of a reinstatement of Yellowstone-like relief, and that if the debtor did not prevail on the merits of the appeal, there was nothing to indicate that it would not be able at that time to cure the default,

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2 which, of course it is proposing now to  
3 do pursuant to Section 365, which permits  
4 the cure of defaults of unexpired leases.

5 I asked for additional case law on  
6 this issue and in reviewing that case law  
7 as well as the procedural history in the  
8 state court where, among other things, it  
9 was argued to the Appellate Division that  
10 the appeal itself was moot, according to  
11 the landlord, for essentially the same  
12 reasons that it's arguing to me that the  
13 lease was terminated, and, therefore,  
14 that the Appellate Division did not have  
15 to decide any issue because of the lapse  
16 of time between the termination of the  
17 Yellowstone injunction by Justice Diamond  
18 and the proposed imposition of the stay  
19 by the Appellate Division. Obviously,  
20 the Appellate Division determined to  
21 continue with the appeal and not to  
22 consider it moot.

23 I've also reviewed again the  
24 specific injunction or stay issued by the  
25 Appellate Division. It was argued simply

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as a matter of semantics by the landlord  
in its response to the additional cases  
sent to me by the debtor that the debtor  
had actually sought the reimposition of  
the Yellowstone injunction and the  
Appellate Division had instead imposed  
merely a stay. I don't really see that  
level of analysis in the Appellate  
Division's order, which says "an appeal  
having been taken to this Court from the  
order of the Supreme Court on or about  
February 28, 2005, and  
plaintiff/appellant having moved pursuant  
to CPLR 5518 and CPLR 5519(c) for a  
preliminary appellate injunction, inter  
alia enjoining respondent from commencing  
any action or proceeding to recover  
possession of the premises, located at  
228-3 230-80s 44th Street, New York, New  
York, interfering with appellant's use  
occupancy and possession of the premises,  
including appellant's relation with its  
tenants and staying proceedings with  
respect to respondent's counterclaims all

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pending hearing and determination of this appeal and for related relief and defendant having responded and having cross-moved for dismissal of the aforesaid appeal or, in the alternative, for an order fixing an undertaking, that the motion for a stay is granted upon the terms and conditions contained in the order of a justice of this Court dated May 6, 2005, which required, among other things, payment and continued payment of the rent, and upon the further condition that plaintiff perfects the appeal for the October 2005 term."

Based on my review of that order, it appears to me that what was indeed at issue in the motion for an appellate injunction was the debtor's continued right to possession of the premises and from that flowed all of its other rights, including the right to collect rent. And that that is what the Appellate Division preserved and that was what was at the start of this case still preserved.

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That's certainly consistent with the logic of a Yellowstone injunction, which is clearly intended to stay the tolling -- stay or toll the running of the cure period, so that after a determination of the merits of a dispute, the tenant may cure the defect, if any is found on the merits, and avoid a forfeiture of the lease. As Judge Diamond herself found in her October 14, 2005 order issuing a Yellowstone or Yellowstone-type injunction for the benefit of the lease mortgage holder here, the courts are not specifically limited to the fact pattern of the Yellowstone case. Indeed, the Appellate Division, First Department, issued Yellowstone-like relief in the form of a preliminary injunction to avoid forfeiture pending determination of default issues on the merits in *Empire State Building Association v. Trump Empire State Partner*, 667 N.Y.S.2d 31, 1st Dept 1997.

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2 So, given the inescapable fact that  
3 the Appellate Division did enter such  
4 relief in the form of its stay, and was  
5 fully aware of the expiration of time  
6 between -- or the running of time between  
7 Justice Diamond's order terminating the  
8 Yellowstone injunction and the request  
9 for a stay of the -- by the debtor at the  
10 Appellate Division, I conclude that's  
11 what was intended by the Appellate  
12 Division.

13 As a matter of law, that may well  
14 be something I can't review under the  
15 Rooker-Feldman doctrine or related  
16 principles of collateral estoppel and res  
17 judicata. But, in any event, it does  
18 appear to me consistent with the law as  
19 set forth in the main case that we had  
20 discussed at the prior hearing, which I  
21 continue to believe is the leading case  
22 in this area: Mann Theaters Corporation  
23 of California v. Mid-Island Shopping  
24 Plaza Company, 464 N.Y.S.2d, 793, 2nd  
25 Dept, 1983, affirmed, 62 NY 2d 930, 1983.

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I recognize, as I had recognized at the earlier hearing, that there are cases where at least in the context of a, not a previously issued Yellowstone injunction, but the expiration of a TRO, courts would not reinstate or retroactively impose, more appropriately, a Yellowstone injunction. That certainly was the result in TW Dress Corporation v. Kaufman, 553 N.Y.S.2d 548, 2nd Dept., 1988. But, since it is ultimately an equitable remedy that can, in my view under the case law, be revived at least if there was a previously issued Yellowstone injunction during an appeal, I think that it was up to the Appellate Division to determine when it issued its stay, whether in fact the debtor should be estopped from attempting to revive such a right because of inactivity, or the like, that was inequitable or inappropriate. And the Appellate Division did not do that. Instead it issued its stay.

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2 So, it appears to me that, again,  
3 what the Appellate Division did was with  
4 knowledge of the background here, because  
5 the landlord made its arguments very  
6 plain to the Appellate Division that it  
7 believed the lease had already  
8 terminated, the Appellate Division, to  
9 the contrary, continued the stay pending  
10 determination of the merits and that  
11 consequently the tenant, having lost on  
12 the merits, should be given a right to  
13 cure, which the Bankruptcy Code, of  
14 course, expressly recognizes under  
15 Section 365.

16 So, in my view, there is a lease  
17 extant that can be assumed. Now, in  
18 terms of the requirements for assumption  
19 and assignment, we had testimony by Mr.  
20 Bildirici with regard to adequate  
21 assurance of future performance. We  
22 hadn't closed the record, however, on the  
23 issue of assumption and assignment, and,  
24 to my mind, the landlord still has an  
25 opportunity to present contrary evidence

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with regard to adequate assurance, and although I believe, with respect to adequate assurance, the debtor had concluded it obviously has the right to rebut any evidence the landlord wants to submit. On that score, Mr. Tofel or Weil Gotshal, I forget which, have provided in addition to the other materials that it provided to me after the last hearing a critique of Mr. Bildirici's affidavit and testimony with regard to adequate assurance. To some extent, I think that critique offered items of evidence as well, but I think I'm capable of sifting through and determining what was a critique and what was not. In addition to having a right, however, as a factual matter, to submit evidence in respect of adequate assurance, the landlord -- I'm sorry -- the landlord has also asserted almost a million dollar cure claim in respect of attorneys' fees over and above the what I refer to as relatively small amount actually needed to cure the repair

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default. And I recognize that amount has not been agreed to expressly, but that's -- the million dollar attorneys' fees are on top of that cure amount. I had said that the landlord needed to provide time records in respect of the attorneys' fees cure claim, which it did, although I don't believe it provided them to the debtor under claims of privilege, saying that they would have to be so heavily redacted, in effect, that there was no reason to provide them, other than just the flat bills without the time records, to the other side. And the amount at issue is so large that I had some real doubts that there could be simply a reserve to cover that issue pending a further hearing in regard to the attorneys' fees, which is why, among other things, I requested that the -- why I required that the debtor at least put up a few hundred thousand dollars pending further discovery in respect of those fees.

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2 So, that's where we stand at this  
3 point. I can have a hearing on the cure  
4 claim as part of the lease assumption  
5 motion. And, again, I don't know whether  
6 the landlord wants to submit evidence on  
7 the adequate assurance issue or not, but  
8 I also would have a hearing on that, too.  
9 But, it seems to me on both of those  
10 points, at least in respect of the cure  
11 point, there needs to be some additional  
12 discovery.

13 MS. LIU: I guess I have a  
14 question, Your Honor. We did submit what  
15 I'll call the projections affidavit, just  
16 for ease of reference --

17 THE COURT: Right. If you don't  
18 want to submit additional evidence on the  
19 adequate assurance point, I'm not telling  
20 you to do it. I think that --

21 MS. LIU: No, I understand that you  
22 are saying we can if we'd like.

23 THE COURT: Right.

24 MS. LIU: I guess I was just  
25 puzzled, though, at your comment about it

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2 being a critique. It says what it says.  
3 It's just trying to show you that -- and  
4 I'll point out it was not responded to.  
5 It's an uncontroverted affidavit.

6 THE COURT: Well, it's not  
7 something I asked to have be submitted,  
8 so I wouldn't expect anyone to respond to  
9 it.

10 MS. LIU: Okay. Well, that's a  
11 fair comment, but the reason we -- I'll  
12 just offer my explanation of why it was  
13 submitted, and that's because that was at  
14 the end of the hearing and Your Honor had  
15 to get to another hearing, and we thought  
16 that it might be difficult for you to  
17 follow the transcript of that portion.  
18 And so, it was an attempt to just write  
19 it down for you.

20 THE COURT: All right. That's  
21 fine.

22 MS. LIU: And, similarly -- okay.  
23 Well, that was the explanation.

24 THE COURT: To the extent that --  
25 and I don't think it's replete with

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2 factual assertions, as opposed to  
3 commentary on Mr. Bildirici's factual  
4 assertions, but to the extent there are  
5 factual assertions in the affidavit, I  
6 took it as the opening shot, if you will,  
7 in the landlord's factual showing on  
8 adequate assurance and, of course, the  
9 debtor would be entitled to cross-examine  
10 Mr. Tofel on those factual assertions.  
11 Now, there are not a lot of them in  
12 there. It's mostly again commentary on  
13 his -- on Mr. Bildirici's testimony. But  
14 I didn't know, having seen that, whether  
15 the landlord actually wanted to have its  
16 own factual record, as well, or would  
17 simply rely on a critique without  
18 additional factual assertions of what the  
19 debtor put in the record on adequate  
20 assurance.

21 MR. TOFEL: Let me rise with a  
22 question which I recognize is somewhat  
23 out of the ordinary. We have commented,  
24 and I don't want to put a label on it --

25 THE COURT: Right.

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2 MR. TOFEL: -- but we've commented  
3 on, for example, the debtor has submitted  
4 projections showing a certain rental  
5 revenue string.

6 THE COURT: Right.

7 MR. TOFEL: I don't know whether  
8 Your Honor takes that as critique,  
9 factual presentation --

10 THE COURT: Well --

11 MR. TOFEL: I want to give Your  
12 Honor what you want. I want to give it  
13 to you in the form that you want it.

14 THE COURT: All right. Well, there  
15 are statements in the affidavit that X  
16 percent of the leases are going to expire  
17 by a date certain and others won't and  
18 you won't be able to raise the rents  
19 because the ones that aren't expiring are  
20 going to continue. If that's in the  
21 record already somewhere, you don't have  
22 to show me that, but if it's not in the  
23 record, you're going to have to show me.  
24 Unless you're happy with the sort of  
25 vague answer that Mr. Bildirici said

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2 which is that some of them will not  
3 expire. So, there are things like that.  
4 I mean, you just have to go through it  
5 and see what are things that are not in  
6 the record yet, and what are things that  
7 are.

8 MR. TOFEL: I guess, the concern  
9 I've got and the question that I'm  
10 raising is we don't view the debtor as  
11 having put forth the facts. They put  
12 forth conclusions.

13 THE COURT: Well, I understand, but  
14 all I'm saying is to the extent you are  
15 putting forth facts, if it's in the form  
16 of an affidavit (a) they have an  
17 opportunity to cross-examine you and (b)  
18 I think as per the last hearing, they  
19 have an opportunity to take your  
20 deposition. That's all.

21 MR. TOFEL: Very well. We  
22 understand Your Honor's comments. Thank  
23 you.

24 THE COURT: Okay.

25 MS. TRAKINSKI: May I just address

1 EAST 44TH REALTY, LLC

2 that, Your Honor?

3 THE COURT: Yes.

4 MS. TRAKINSKI: You're absolutely  
5 right. One of the reasons we put no  
6 response in to that portion of their  
7 submission was the fact that we're still  
8 waiting for the opportunity to depose Mr.  
9 -- or Mr. Tofel.

10 THE COURT: All right. And again,  
11 I don't fault the landlord for not making  
12 him available yet. I think there was  
13 enough ambiguity and tha, that's fine.

14 MS. TRAKINSKI: Is Your Honor  
15 prepared to address the issue of  
16 disclosure of the time records because  
17 without them, frankly, we're lost.

18 THE COURT: Yes, I am. I want to -  
19 - first of all, I think it's fair, since  
20 this has clearly involved enough legal  
21 hours already, to give you all some  
22 preliminary guidance on the standard by  
23 which I believe the aspect of the cure  
24 that the landlord asserts is attributable  
25 to attorneys' fees should be reviewed by

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2 me.

3 As I see it, it's a three-step  
4 analysis and it's laid out well, or at  
5 least clearly enough, in three Southern  
6 District cases and well discussed in a  
7 Delaware case.

8 The first step is to review the  
9 actual provisions of the lease that  
10 provide for attorneys' fees, because  
11 without such provisions a landlord would  
12 not have a right to attorneys' fees in  
13 connection with either a claim under 502  
14 or here, a cure claim under Section  
15 365(b) (1) (B) .

16 And I've done that and there  
17 clearly are three provisions that are  
18 applicable here. Paragraphs 12 and 26 of  
19 the lease speak to attorneys' fees  
20 generally in connection with enforcing  
21 rights under the lease in respect of the  
22 default. And paragraph 13, if I needed  
23 it, addresses a right to fees in respect  
24 to the Yellowstone injunction litigation  
25 which Justice Diamond awarded anyway, to

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the extent they were reasonable, in her decision. She didn't award a specific amount of fees. She said that the landlord would be entitled to reasonable fees. But, as the courts have been clear, that's the first step in the analysis.

The second step involves a bit more of the exercise of judgment on my part and leaves, some open area for dispute, obviously, which is that the cases have been careful to make a distinction in connection with landlord claims for attorneys' fees as to whether they are claims for actions undertaken by the landlord to enforce rights under the lease in a manner consistent with Section 365, for which they'd be compensable, or whether they're or they were incurred in connection with contesting the debtor's rights generally under the Bankruptcy Code, for which they're not compensable. On the outer edges this is a pretty easy distinction to make when landlords seek

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to compel assumption or rejection; for example, for termination of exclusivity or dismissal of the case for bad faith or the like, the courts have been pretty quick to find that those are not appropriate cure claim rights, incur claims under leases that have similar language to the language here. On the other hand, where the landlord is realistically and reasonably in doubt as to whether it will be paid its rent and seeks to enforce its right to be paid rent, then that is part of the cure claim, clearly.

Intermediate steps are a little more difficult. For example, in the Delaware case I mentioned -- I'll give you all the cites on this at the end -- where the right to attorneys' fees itself in connection with asserting a cure claim for attorneys' fees was a matter of first impression, Judge Walrath found that there was a basis to provide for some attorneys' fees in that area, because the

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law was not clear and of course attorneys' fees themselves were a part of the lease.

The third step of the analysis is to determine whether the fees were reasonable. And the courts again are clear that this is not a simple lodestar analysis where you look at the work done and the normal fee requested, but have to factor in other factors, including the amount of the dispute relative to the attorneys' fees requested, the debtor's good faith to resolve the amount at issue, the debtor's compliance with the Code and whether the issue is a matter of first impression. Judge Beatty in the Nicfur-Cruz Realty Corporation case boiled it down ultimately to whether in addition to the lodestar factors, the services were necessary to accomplish the appropriate end that was sought and she found that a substantial disproportion of the fees sought to the amounts involved in conjunction with the clear rights,

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powers and privileges afforded the debtor by the Bankruptcy Code would result in limitations of an attorneys' fees claim even if it was otherwise provided for under the parties' agreement, because it was not reasonable.

Anyway, let me give you the cases that discuss this in addition to In re Nicfur-Cruz Realty Corporation, which is 50 BR 162 Bankruptcy S.D.N.Y. 1985, which really focuses on the reasonableness analysis, and that is the third prong of the analysis.

I've been relying heavily on a summary and analysis of the case law in this area by Judge Walrath in In re Crown Books Corporation, 269 BR 12 Bankruptcy District Delaware 2001, where she also applies the same point that Judge Beatty did in Nicfur-Cruz with regard to fees substantially in excess of the amount in dispute.

In addition, Judge Sweet in Loews Cineplex Entertainment Corporation at 202

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Westlaw 535479 S.D.N.Y. April 9, 2002,  
discusses the distinction between issues  
based on the landlord's right to collect  
amounts due under its bargained-for lease  
and otherwise to enforce its rights under  
the lease. In contrast to cases that did  
not allow fees where the landlord was  
dealing with bankruptcy-related issues,  
contrary to bankruptcy rights that the  
debtor had, such as to generally assume  
or reject, maintain the exclusive period,  
extend the time to assume or reject and  
the like, Judge Sweet cites the cases  
there that I've also reviewed but, in  
particular, Judge Brozman's case In re  
Best Products Company, 148 BR 413  
Bankruptcy S.D.N.Y. 1992 appears to me to  
be relevant in that there, a lot of time  
was spent in essence seeking to terminate  
the lease.

Then, finally, the case of In re  
Child World, Inc., 161 BR 349 Bankruptcy  
Southern District New York 1993.

In light of those cases, I think

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2 it's important to review the time records  
3 in detail, particularly those for the  
4 post-petition period. I really have  
5 little, if any, problem with the pre-  
6 petition time records of landlord/tenant  
7 counsel. But as you can see from my  
8 going through the three-step analysis in  
9 regard to the cure claim, the post-  
10 petition time, which, as I took it was  
11 all the time in this case of Weil Gotshal,  
12 and Mr. Tofel's really does require  
13 parsing through because there's been a  
14 lot of activity in this case, much of  
15 which may not be compensable under the  
16 standard that I've just described, that  
17 is the second prong of the standard,  
18 leaving aside the reasonableness issue.

19 I also think that there's another  
20 issue with regard to Mr. Tofel's time on  
21 the reasonableness point, which is that  
22 normally the Courts are sensitive to  
23 duplication of effort by counsel, and  
24 he's very effective and Ms. Liu and Weil  
25 Gotshal are very effective, but it's not

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2 clear to me that a cure claim should  
3 cover both of them. And that's  
4 particularly the case if Mr. Tofel has  
5 really been acting largely as the client  
6 and if that's why he was needed to be  
7 here to assist Ms. Liu. So in weighing  
8 the request -- well, I took it as a  
9 request, although it was stated as a fact  
10 -- that the landlord was not going to  
11 provide its time records to the tenant  
12 debtor, I believe, because of attorney  
13 client privilege, I believe that those  
14 records are essential to deciding this  
15 issue. And while obviously I'm sensitive  
16 to the attorney client privilege, I think  
17 that a blanket withholding of those  
18 records is outweighed by the materiality  
19 of the issues that I've just gone through  
20 and the prejudice to the debtor.

21 MS. LIU: Could I just comment on  
22 that?

23 THE COURT: Yeah.

24 MS. LIU: The reason that at least  
25 in the first instance they weren't

1 EAST 44TH REALTY, LLC  
2 provided was simply this. We thought  
3 that Your Honor, based on the principles  
4 you just enunciated, was going to look  
5 through them and apply those principles  
6 and make the decision yourself because  
7 you're the Court.

8 THE COURT: Well --

9 MS. LIU: Well, hold on. I'm  
10 explaining.

11 THE COURT: Okay.

12 MS. LIU: And the reason is because  
13 it's been the debtor's position, almost  
14 like a foregone conclusion, that none of  
15 the fees are reasonable. So, we thought  
16 that that would be a kind of a futile  
17 exercise. But we're prepared to, of  
18 course --

19 THE COURT: Well, I understand, but  
20 I have to assume, and if I'm wrong about  
21 this assumption, it'll probably come back  
22 to bite them when their own fees are  
23 reviewed, that in addition to making any  
24 blanket objection, which is easily made  
25 in one sentence and shouldn't take a lot

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2 of time and shouldn't result in a lot of  
3 expense being incurred by the estate,  
4 that they'll make the proper objection  
5 based on the more nuanced analysis that's  
6 required. And I can't preclude them from  
7 doing that. I'm not some form of -- it's  
8 an adversary system; I can't decide it  
9 without giving them the chance to review  
10 it.

11 Again, I don't fault you for doing  
12 it this way because as far as you knew,  
13 it would all be moot, so why waive the  
14 attorney client privilege if this issue  
15 never is going to come up anyway?

16 MS. LIU: That's right, Your Honor.

17 THE COURT: So, I don't fault you  
18 for that. But I think at this point,  
19 however, they are entitled to review  
20 them.

21 MS. LIU: And we -- of course we  
22 would then do that but we would of course  
23 want to just take a look at them and  
24 redact anything that we think it's  
25 appropriate. But also in connection with

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this, you know, I need, I think, a little guidance on this. We did submit an affidavit that talked about I guess what you referred to as the mitigation, you know, the settlement efforts.

THE COURT: Right.

MS. LIU: And is Your Honor going to factor that into your review? Because that's why we submitted it.

THE COURT: Yes. Unfortunately, it is an element in the cases. I mean, it's something that Judge Beatty went through, for example, in Nicfur. And I know that there was an attorneys' affidavit submitted in response this morning which I just really skimmed through. I didn't really pay much attention to it. In my view, if this can't be resolved that's also an issue that I probably need to hear cross-examination on.

MR. TOFEL: The fact or observation that Your Honor made as a matter of fact. It's not correct and Your Honor is misunderstanding whether the claim that

1 EAST 44TH REALTY, LLC  
2 the landlord's attorneys' fees, at least  
3 as concerns my firm's time, are all in  
4 the post-petition period.

5 THE COURT: Oh, I know they're not.  
6 No, I'm saying the post-petition part of  
7 your firm's time

8 MR. TOFEL: Okay.

9 THE COURT: That's what I'm  
10 referring to. When you're acting as --  
11 as long as you're not acting,  
12 effectively, as the client in the pre-  
13 petition time, again, the pre-petition  
14 time I don't really have much of a  
15 problem with, except on that one point,  
16 which is -- you know, is this something  
17 that you -- I don't really know -- I've  
18 been told you're the managing agent for  
19 the client. I don't know if that's true.  
20 That may be an issue. But that's, as far  
21 as I can see, the only issue.

22 MR. TOFEL: My affidavits say that  
23 I am the manager of the landlord. That  
24 is, in fact, correct.

25 THE COURT: Well, see, but I don't

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2 know what that -- I don't know whether  
3 you separately bill people for -- that's  
4 a separate issue.

5 MS. TRAKINSKI: Well, that's part  
6 of the whole discovery process, Judge.

7 THE COURT: Exactly. That's part  
8 of the discovery process.

9 MR. TOFEL: Let me deal with just  
10 something else, and that is, what I would  
11 propose and I don't know if Your Honor  
12 has, frankly, concluded the rulings that  
13 Your Honor wishes to impart today.

14 THE COURT: Well the thing on  
15 attorneys' fees is just some guidance to  
16 you.

17 MR. TOFEL: No, no, I appreciate  
18 that. And I understand Your Honor's  
19 rulings before and, obviously, you  
20 recognize with them, respectfully, there  
21 obviously are some things that are now  
22 going to go forward. I take Your Honor's  
23 comments to require us to deliver time  
24 records and we will deliver time records.  
25 We will go through them and redact the

1 EAST 44TH REALTY, LLC  
2 things that we are most particularly  
3 concerned about and deliver records to  
4 counsel. But I just want to make sure  
5 that we understand each other. Your  
6 Honor includes anything for which we seek  
7 reimbursement. That is correct.

8 THE COURT: That's right.

9 MR. TOFEL: Okay.

10 MS. TRAKINSKI: Judge, may I --

11 THE COURT: He's not finished yet.

12 MS. TRAKINSKI: -- the timing of  
13 this should be only be the post-petition  
14 one?

15 MR. TOFEL: Well, that's what I  
16 think -- I think that's what he's not  
17 saying. He's not saying it's post-  
18 petition.

19 THE COURT: No, you should provide  
20 them all. I can tell you that if there  
21 was a privilege issue with regard to your  
22 landlord/tenant firm, I would be -- you  
23 redact and they say they shouldn't be  
24 redacting this much, when I review it in  
25 camera, I'll probably be more sensitive

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2 to your point than their point. But the  
3 balance kind of flips for the post-  
4 petition period. And the separate issue  
5 as to your role as managing agent and  
6 attorney for the pre-petition period,  
7 that was the basis for my distinction.  
8 But they're entitled to all the time  
9 records.

10 MR. TOFEL: Okay.

11 MS. TRAKINSKI: Judge, can I  
12 address the redaction issue?

13 THE COURT: Yes.

14 MS. TRAKINSKI: In re Pine 50  
15 speaks very clearly about the add issue  
16 waiver here. It's our position that the  
17 redaction in and of itself is  
18 inappropriate and anything they're  
19 redacting, they're not entitled to claim.  
20 If they're claiming fees for a  
21 conversation, for example, we're entitled  
22 to know what the subject of that  
23 conversation was. It's going to be very  
24 difficult for us to probe the  
25 reasonableness, particularly of the post-

1 EAST 44TH REALTY, LLC  
2 petition period, as you point out,  
3 because we've got this dichotomy of Mr.  
4 Tofel's role.

5 THE COURT: Well, all right. I can  
6 deal with that --

7 MS. TRAKINSKI: And, by the way,  
8 Judge, just if I may, I'm sorry. The  
9 dichotomy of roles applies to the pre-  
10 petition period as well because Mr. Tofel  
11 was acting as the manager.

12 THE COURT: No, I already said  
13 that. I've already addressed that. It  
14 does, I agree.

15 MS. TRAKINSKI: The redaction issue  
16 is a real problem and I'm not sure that  
17 we can adequately depose him if we --

18 THE COURT: Well, if -- I don't  
19 know how much they're going to redact.  
20 If it becomes an issue, then you can  
21 raise it.

22 MS. LIU: Yeah, Your Honor, I would  
23 like to just comment.

24 MR. BACKENROTH: Your Honor, if I  
25 can have a word, as well.

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2 THE COURT: Well, I think Ms. Liu  
3 was next.

4 MS. LIU: I would like to just  
5 comment that redaction is pretty standard  
6 procedure when attorneys' fees are  
7 submitted in bankruptcy cases --

8 THE COURT: I agree. I agree. I  
9 think it's something that people can use  
10 their judgment on. If you have cases  
11 that you want to give to Ms. Liu, that's  
12 fine and she can use her judgment on it.  
13 And if there's still a disagreement, I'll  
14 resolve that.

15 MS. TRAKINSKI: I'm reminded  
16 there's one other issue with respect to  
17 at least the bills that are attached to  
18 Mr. Tofel's affidavit. I don't know what  
19 Your Honor received in terms of the  
20 actual time records, but they've only  
21 submitted bills with his affidavit. We  
22 understand there are fees they've not  
23 even been paid for. There's a  
24 substantial amount of fees from what we  
25 can tell that they've already been

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2 reimbursed for and used Mr. Tofel's --

3 THE COURT: All right. Well,  
4 that's a separate issue which you can --  
5 you can take up in discovery.

6 MS. TRAKINSKI: But I want to make  
7 sure that the order is clear that what  
8 they have to turn over to us in terms of  
9 time records is every single dollar  
10 they're claiming was spent on this and  
11 that they're claiming and they can't --

12 MS. LIU: Your Honor, that's not  
13 correct.

14 MS. TRAKINSKI: Judy, can I please  
15 finish? I've been respectful.

16 THE COURT: There's no order.  
17 That's part of the -- I mean that's what  
18 you can ask Mr. Tofel on discovery.

19 MR. BACKENROTH: Your Honor, if I  
20 may --

21 THE COURT: There's no order. I'm  
22 not issuing an order today. That's all  
23 I'm saying.

24 MS. TRAKINSKI: We may come back to  
25 you for one later on.

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2 THE COURT: All right. But I would  
3 assume that if there's an actual issue as  
4 to what the landlord's been paid or not,  
5 they're going to have to show that. I  
6 mean, you can't submit a claim unless --  
7 if there's a legitimate dispute as to  
8 whether the claim has been paid or not,  
9 that's a fair game for discovery.

10 MR. BACKENROTH: Your Honor, if --

11 MS. LIU: And, Your Honor, what's  
12 at issue is the cure amount which by  
13 definition means --

14 THE COURT: Unpaid.

15 MS. LIU: -- it's the unpaid  
16 amount.

17 MR. BACKENROTH: No, it's a little  
18 bit more than that because if for  
19 argument's sake, the claim can be a  
20 million three of which three hundred  
21 thousand they've been paid, when we talk  
22 about the analysis between what it is and  
23 what they intended to cure --

24 THE COURT: No, you can ask Mr.  
25 Tofel what he's been paid, that's fine.

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2 MR. BACKENROTH: And we can also  
3 ask for the time sheets as to what he's  
4 been paid, as well, because it comes to  
5 the reasonableness of the total fees that  
6 have been requested. And what he has  
7 been paid towards that and whether or not  
8 how much more has to be paid towards that  
9 activity, so I think breaking it off of  
10 at that point does not allow us to  
11 present a full picture to Your Honor.

12 I was going to suggest yet  
13 something in addition that I think would  
14 be helpful in order to get the ball  
15 rolling. And I mean that what I would  
16 like to see from the landlord's counsel  
17 as one would have in a fee application  
18 presented to this Court a breakdown of  
19 their time and the allocations into his  
20 portions, so that we can take a look at -  
21 -

22 THE COURT: No, they don't have to  
23 do that. I don't think they have to do  
24 that under this standard. This isn't  
25 503(b), this isn't --I don't think this

1 EAST 44TH REALTY, LLC  
2 is covered by the Fee and Expense  
3 Guidelines like that.

4 MR. BACKENROTH: It's not for the  
5 purpose of the guidelines. It's for the  
6 purpose of trying to calculate certain  
7 services, whether or not they are  
8 compensable. Otherwise we'll have to do  
9 it if Your Honor -- we'll do that if we  
10 have to do that.

11 THE COURT: You know, I know it  
12 will be helpful to me but I think it's up  
13 to them whether they want to do that or  
14 not.

15 MR. BACKENROTH: Fine. We'll ask  
16 for our discovery.

17 THE COURT: I mean, there's a risk  
18 in not doing it as much as in doing it.  
19 Because there's bound to be some level  
20 of, as Judge Walrath said in her case,  
21 she did the best she could in determining  
22 what was reasonable in looking at a stack  
23 of things. And if it's not broken down  
24 in manageable chunks of time, it's easier  
25 to make a mistake one way or the other.

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2 But it's not really a mistake because  
3 you're just acting -- in essence you're  
4 acting as an objective person who says  
5 what's reasonable or not and --

6 MR. BACKENROTH: Then, Your Honor,  
7 we'll go about doing that as part of our  
8 discovery then.

9 THE COURT: Okay. All right.

10 MR. TOFEL: Let me deal with a  
11 couple of items that I alluded to earlier  
12 that now impact or are impacted by Your  
13 Honor's determinations this morning.

14 THE COURT: Okay.

15 MR. TOFEL: Most specifically, and  
16 let me deal with them in discrete  
17 modules, if I can, Your Honor has  
18 commented on whether to offer the  
19 landlord opportunity, if we will, to put  
20 in factual presentations, as opposed to,  
21 I guess, what Your Honor described as a  
22 critique, and I don't -- there's no  
23 pejorative in there. I understand I'm  
24 just trying to give labels. One of the  
25 things that would enable us to do that,

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2 and Your Honor heard a lot at the  
3 beginning of this case about our request  
4 for and we had worked for, literally, a  
5 year to get and with Your Honor's help,  
6 we finally did get some, but not all of,  
7 the subleases. We clearly have some.  
8 What I would ask Your Honor today to  
9 direct the debtor to do is take the  
10 whatever date upon which they last  
11 delivered subleases to us, I accept them,  
12 I think they represented at the time that  
13 we had all that they had at that point.  
14 What I would ask them, in short order, is  
15 to deliver to us any leases that have  
16 either incepted since that point going  
17 forward or any leases that have come up  
18 for a renewal at that point. So that,  
19 between that delivery and the prior  
20 deliveries we have --

21 THE COURT: All right. If I don't  
22 see it that's fine, right? You can do  
23 that, can't you?

24 MR. BACKENROTH: Yeah, within some  
25 reasonable time we'll put it together.

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2 THE COURT: All right. Okay.

3 MR. TOFEL: Secondly, the -- I  
4 referred to earlier some events that have  
5 transpired since we were here last. Let  
6 me deal with one in particular, and Your  
7 Honor has now heard numerous times about  
8 insurance issues. As Your Honor will  
9 recall back in December, Your Honor  
10 issued a directive shortly before the  
11 holiday right after the Appellate  
12 Division had issued a decision where you  
13 made it very clear and directed the  
14 debtor to reimburse the landlord for its  
15 insurance. At that point and at  
16 subsequent points, Mr. Graham had come to  
17 court and complained that we were not  
18 cooperating in enabling the debtor to  
19 afford itself of its opportunities under  
20 the lease. The -- that amount was, as  
21 Your Honor will recall, paid. In March,  
22 last week, actually, the umbrella and  
23 excess insurance policies that the  
24 landlord maintains were renewed. The  
25 lease provides that not less than twenty

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days before that renewal, if the debtor wishes to or if the tenant wishes to, it can deliver to the landlord fully paid copies of insurance policies that it proposes to offer as replacement and umbrella insurance. The debtor did not do that. That day came and went. It was February 14th. Happy Valentines Day, everyone. On February 17, I bound the renewal, effective March 6 of the existing and renewing excess in umbrella insurance. I submitted to the debtor the broker's invoice. It's approximately 54,450 dollars asking to be reimbursed. As of this moment, we've not been reimbursed. What we've been told is that the debtor has gone out and bought other coverage. That other coverage is not compliant with the lease for -- on several reasons and simply on its face. It doesn't even require exhaustive analysis. It doesn't name the proper insured, it doesn't name the landlord at all as an insured. It's inadequate in

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2 the amounts and what they've done is  
3 rather than buy excess or umbrella  
4 coverage over the existing primary  
5 insurance, they've gone out and bought a  
6 totally separate primary coverage which  
7 is in and of itself wholly inadequate.  
8 So, they've literally refused, despite  
9 Your Honor's orders, to reimburse us and  
10 we'd like to be reimbursed. It's 54,450  
11 dollars due under the lease. Paragraph  
12 10 makes it clear as a matter of fact and  
13 a matter of law that it has to be  
14 reimbursed. The debtor had, if it had a  
15 lease at all, and we understand Your  
16 Honor's determination, it had until  
17 February 14 to propose --

18 THE COURT: Okay. All right. This  
19 is not really teed up in front of me -- I  
20 mean, I appreciate you alerting me to  
21 this, but is this in dispute?

22 MS. Trakinski: Can I -- I have to  
23 address it, Judge.

24 MR. TOFEL: Excuse me. It is --  
25 let me, please.

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2 THE COURT: No, I mean, the facts  
3 aren't in front of -- I mean, it's just  
4 two lawyers talking. It's -- you know

5 MS. TRAKINSKI: Well, Judge, I have  
6 the facts to hand out --

7 MR. TOFEL: No, it's not two  
8 lawyers talking. Your Honor has issued  
9 orders --

10 THE COURT: No, no. This part is  
11 two lawyers talking. I don't have -- I'm  
12 not going to sit here now and parse  
13 through what the lease requires. That's  
14 all I'm saying.

15 MR. TOFEL: Your Honor has already  
16 ruled what the lease requires.

17 THE COURT: No, no, no. You don't  
18 understand what I'm saying. I appreciate  
19 what you're telling me. The debtor's  
20 lawyer is standing and I guess she wants  
21 to tell me something different.

22 MS. TRAKINSKI: I just --

23 THE COURT: But ultimately it's  
24 just two lawyers talking. I understand I  
25 told him to pay the insurance, but if

1 EAST 44TH REALTY, LLC  
2 they have some other way of paying the  
3 insurance -- I mean, I don't know. What  
4 do you have to say?

5 MS. TRAKINSKI: We paid the  
6 insurance. Paragraph 10 of the lease.  
7 You can sit down, Larry, and let me speak  
8 now. Paragraph 10 of the lease provides  
9 the tenant shall insure the building.  
10 And there's a phrase the tenant shall  
11 procure, the tenant shall pay over and  
12 over again. So, first of all, paragraph  
13 10 does not require the landlord to buy  
14 insurance and the tenant to pay, number  
15 one.

16 THE COURT: But are there --

17 MS. TRAKINSKI: Number two, Mr.  
18 Bildirici gave the landlord more than 28  
19 months to review the proposed insurance  
20 that he had had designed by an insurance  
21 broker, several people reviewed the  
22 lease, he's been given absolute assurance  
23 that what he's purchased and his purchase  
24 -- a binder was delivered to the landlord  
25 that does --

1 EAST 44TH REALTY, LLC

2 THE COURT: Within the time frames  
3 that the lease requires?

4 MS. TRAKINSKI: The binder, the  
5 binder -- yes.

6 MR. TOFEL: Excuse me.

7 THE COURT: Well, wait. No, no.  
8 Look.

9 MS. TRAKINSKI: Larry, please.

10 THE COURT: There are two people --  
11 one thing about lawyers that I do accept  
12 is that they have an obligation to at  
13 least tell me something that they believe  
14 in good faith is accurate. Once they do  
15 that, and once they're saying two  
16 different things, I can't decide it on  
17 the fly. You know, Judge McKelvey, one  
18 of his favorite movies was the movie  
19 Diner. You remember that movie?

20 MS. TRAKINSKI: Yes.

21 THE COURT: It's a real good movie.  
22 It's all about a bunch of people sitting  
23 around talking. It's a great movie but  
24 it wouldn't be a good trial because  
25 they're just talking. And that's what

1 EAST 44TH REALTY, LLC  
2 this is, is people talking. If there's a  
3 dispute that two lawyers are telling me  
4 is a legitimate dispute, it has to be  
5 teed up in front of me so I can actually  
6 decide it.

7 MR. BACKENROTH: We'd like to  
8 opportunity to respond to such a thing as  
9 well.

10 MR. TOFEL: I appreciate what Your  
11 Honor is saying; however, it does not  
12 take a rocket scientist to look at a  
13 calendar --

14 THE COURT: All right. So, tee it  
15 up promptly, that's all. Maybe you're  
16 right. If you're right, then it's a real  
17 big strike against the debtor, because  
18 it's -- I think that maybe they're being,  
19 generally, intransigent. On the other  
20 hand, if you're wrong, you're wrong.  
21 But, tee it properly -- if it's really  
22 simple to understand, just tee it up very  
23 quickly. I'll decide it.

24 MR. TOFEL: We will do that.

25 THE COURT: Okay.

1 EAST 44TH REALTY, LLC

2 MR. TOFEL: The other issue is  
3 continued use of cash. And I want to  
4 deal with that very directly and then  
5 Your Honor can maybe give us guidance.  
6 And then I have a request or a proposal  
7 for how we move forward over the next  
8 days, weeks and months. Your Honor ruled  
9 in January that the debtor's use of cash  
10 would continue through some date in  
11 February. It hasn't renewed since then.  
12 Be that as it may --

13 THE COURT: Is there an extant  
14 order? Is there an order, a cash  
15 collateral order?

16 MR. TOFEL: No. No. The debtor  
17 has operated for the last month without  
18 permitted use of cash. That's not the  
19 issue. The issue, interestingly enough,  
20 is that on January 18, Your Honor was  
21 very clear in continuing cash and Your  
22 Honor made specific rulings that part of  
23 what was motivating the Court's  
24 determination was that the debtor had  
25 been represented to Your Honor that it

1 EAST 44TH REALTY, LLC

2 had not for some time and would not,  
3 prospectively, and Your Honor made it  
4 clear, that the debtor could not pay its  
5 management fee going forward. Although  
6 we don't have any information with  
7 respect to the month of February. That  
8 is, the March operating reports haven't  
9 been filed and the debtor has yet once  
10 again failed to provide us with a level  
11 of detail or anything about February that  
12 Your Honor has previously ordered. The  
13 February operating report for the month  
14 of January shows that, contrary to Your  
15 Honor's ruling, the management fee is  
16 being paid. Again, we think it's a clear  
17 violation of Your Honor's ruling --

18 THE COURT: Well, didn't -- I  
19 thought there was a portion of the  
20 management fee that could be paid, which  
21 was --

22 MR. BACKENROTH: That's right.

23 MR. TOFEL: No.

24 THE COURT: -- their sort of bread  
25 and butter employees, and that the

1 EAST 44TH REALTY, LLC  
2 management fee that goes to Mr. Bildirici  
3 was going to be escrowed or something to  
4 that effect?

5 MR. BACKENROTH: He had the right,  
6 exactly. But direct expenses as opposed  
7 to the profit or however you want to  
8 characterize it --

9 MR. TOFEL: Right. Your Honor said  
10 on January 18 on page 36, beginning at  
11 line 14, and I'm quoting, As I understand  
12 it, the debtor has not been paying any  
13 management fee to its insider for at  
14 least a couple months --

15 THE COURT: Yeah, to the insider.

16 MR. TOFEL: The insider.

17 THE COURT: Yeah.

18 MR. TOFEL: No, the management fee  
19 that is paid goes to B&F Imports. That  
20 is the insider. What we are talking  
21 about -- let me go back. There was -- if  
22 Your Honor referred to there was a six  
23 percent fee and Your Honor directed that  
24 one percent or one-sixth of that go into  
25 escrow. We're talking about now not just

1 EAST 44TH REALTY, LLC  
2 the one percent, but the five percent --  
3 the total six percent. And Your Honor  
4 said --

5 THE COURT: That's not what I was  
6 talking about. I was talking about the  
7 money that really went to the insider,  
8 Bildirici. The other people I thought  
9 you didn't have a problem with because  
10 they were the people, that was the  
11 bookkeeper, and the person that checked  
12 on the tenants --

13 MR. TOFEL: No, Judge.

14 THE COURT: -- the ordinary -- the  
15 ordinary Joes.

16 MR. TOFEL: Your Honor did not  
17 distinguish --

18 THE COURT: Because we weren't  
19 talking about that.

20 MR. TOFEL: Yes, we were.

21 MS. TRAKINSKI: Judge, if he thinks  
22 we're in violation of the order he should  
23 tee this one up, too.

24 THE COURT: Well, all right. Well,  
25 no, what really should be done is the

1 EAST 44TH REALTY, LLC  
2 debtor should tee up a request for use of  
3 cash collateral because the order is --  
4 I'm not comfortable proceeding on just  
5 matters that are stated on the record  
6 about continuation of cash collateral.

7 MS. TRAKINSKI: We'll take care of  
8 that early next -- by the beginning of  
9 next week, Judge.

10 THE COURT: Okay.

11 MR. TOFEL: The last issue that I  
12 would propose, Your Honor obviously  
13 envisions or either now agreement between  
14 the parties or further discovery. It  
15 won't come as a surprise to you that we  
16 respectfully disagree with Your Honor's  
17 ruling on what we've referred to  
18 colloquially as the gating issue. I do  
19 believe and we have to consider whether  
20 we're going to seek review of that. My  
21 question for Your Honor would be whether  
22 we can agree or whether Your Honor would  
23 entertain coming to an agreement on  
24 continued use of cash very much  
25 consistent with prior budgets as Your

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Honor has ruled that we defer for a brief period of time the issue which is going to require a great deal of lawyer's time on the issue of cure amounts and things of that ilk until we both either determine whether we're going to seek review and obtain that review.

THE COURT: Well, that's -- I haven't -- this isn't an order. This is for the parties' convenience. I've staged this this way. But there's only one order that I'm going to issue, which is an order granting assumption or rejection or not.

MR. TOFEL: Well, Your Honor had before you a motion to lift stay under paragraph 24 of the lease and allow us to collect sublease proceeds and that teed up as Your Honor will recall the issue of lease termination.

THE COURT: Well, I guess I can -- you're right, I can rule on that.

MR. TOFEL: I think Your Honor has.

MS. TRAKINSKI: Yeah.

1 EAST 44TH REALTY, LLC

2 MR. TOFEL: As we understand it,  
3 Your Honor --

4 THE COURT: No, I mean, I can issue  
5 an order on that. That's fine. It's an  
6 interlocutory order, but I can issue it.  
7 I had forgotten that you had separately,  
8 in addition to in your objection to the  
9 motion, you had, I remember, separately  
10 made your lift/stay motion.

11 MS. LIU: Are you saying it's  
12 interlocutory, Your Honor? Because  
13 you're saying that maybe after you hear  
14 all the cure amount-related testimony.

15 THE COURT: No, it's a motion for  
16 relief from the automatic stay.

17 MS. LIU: -- you may decide to not  
18 allow the assumption of the lease? Is  
19 that why? Because otherwise you've  
20 ruled.

21 THE COURT: No, I had -- Mr. Tofel  
22 had reminded me that there was a separate  
23 motion for relief from the automatic stay  
24 for lack of adequate protection and the  
25 like. I think that given the analysis

1 EAST 44TH REALTY, LLC  
2 that I have to do on a lift/stay motion  
3 it is interlocutory. It does decide one  
4 issue in that context. But that's a  
5 separate -- I'm not talking about the  
6 motion to assume.

7 MS. LIU: Okay. You were talking  
8 about that motion but I guess my question  
9 to you now is you've made a ruling on the  
10 law and the facts and the law that the  
11 lease did not terminate --

12 THE COURT: Just as a matter of  
13 staging this -- the handling of this  
14 trial.

15 MS. LIU: Okay. And then you're  
16 saying, when you hear the rest you'll  
17 make your final determination on whether  
18 --

19 THE COURT: Right. As to whether  
20 it can be assumed or not.

21 MS. LIU: --the lease is assumable  
22 or not. But didn't you separately  
23 already decide it hasn't been terminated?

24 THE COURT: Yes.

25 MS. LIU: Okay. But you don't see

1 EAST 44TH REALTY, LLC

2 that as a separate --

3 THE COURT: It's all in the context  
4 of a motion to assume. So, I don't think  
5 so.

6 MS. TRAKINSKI: But there's no  
7 separate motion on the issue.

8 MR. BACKENROTH: It's  
9 interlocutory.

10 THE COURT: There is no request for  
11 declaratory judgment. It's just to  
12 really to give all the parties, as I  
13 think they had sought, a way to handle  
14 this matter efficiently. But Mr. Tofel's  
15 right. There was a separate motion.  
16 I'll go back and look at that. If this  
17 equally -- if my determination as to  
18 termination or not, which I dealt with  
19 today, applies to that motion, and I  
20 think it probably does as I remember that  
21 motion now, I'll issue an order on that.

22 MR. TOFEL: Thank you, Judge.

23 THE COURT: All right. I guess you  
24 all have to get the time records and work  
25 out a discovery schedule. I don't know

1 EAST 44TH REALTY, LLC  
2 if you're going to take anyone's  
3 deposition besides Mr. Tofel's.

4 MS. LIU: Oh, yes. We will, Your  
5 Honor.

6 THE COURT: All right. So, I think  
7 for now -- well, you're going to be  
8 making a motion for continued use of cash  
9 collateral. I will adjourn this hearing  
10 or continue this hearing to that date  
11 which should definitely be within the  
12 next few weeks.

13 MS. LIU: Can I just mention a  
14 scheduling difficulty? We've previously  
15 accommodated Ms. Trakinski's vacation and  
16 I guess it's now my turn. I was going to  
17 be away between March 22 to March 31.

18 THE COURT: Okay.

19 MS. TRAKINSKI: No problem.

20 MR. BACKENROTH: That period of  
21 time is difficult for me, too, so that's  
22 --

23 MS. LIU: And I have a --

24 THE COURT: Why don't you all work  
25 out, you can work out -- maybe this

1 EAST 44TH REALTY, LLC

2 would be a good thing. You can work out  
3 the schedule among yourselves. Maybe  
4 that would be an initial step to perhaps  
5 trying to work together.

6 MS. TRAKINSKI: We're not looking  
7 to inconvenience anybody, Judge.

8 MR. BACKENROTH: Yeah.

9 THE COURT: Okay. All right. The  
10 last thing I'll say which I guess I just  
11 alluded to is I understand that the  
12 landlord has hotly asserted over the  
13 course of proceedings both in state court  
14 and here for a number of months its view  
15 that the lease terminated. And it's  
16 certainly entitled to continue to pursue  
17 that issue. On the other hand, knowing  
18 now that it would do it on an appellate  
19 level and knowing also, sort of  
20 generally, how I view the attorneys' fee  
21 issue, and I think, frankly, the Best  
22 Products and Nicfur cases are pretty  
23 instructive there, as well as Judge  
24 Walrath's case in Crown, in light  
25 ultimately of the underlying cure costs,

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separate and apart from the attorneys' fees being what I think everyone would agree is relatively a small amount of money, I would strongly urge the parties to try to resolve this. One aspect of that resolution in my mind clearly is adequate assurance of future performance, and I think one element that the landlord's fully entitled to is assurance that the lease will continue to be performed. But I have a hard time seeing at this point continually mounting attorneys' fees to terminate this lease when the ultimate expense in respect of the building is relatively small. I don't know whether an appellate court would agree with me, but it just seems to me to be contrary to the general policy under New York law as certainly clearly well under the bankruptcy law to keep doing this. And so, I would really urge the parties to try to reach a reasonable settlement here. One thing's clear to me is that this being America, the landlord

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does have the right to continue to litigate. And I don't think its position is frivolous, by any means. So the debtor is going to continue to be out its attorneys' fees, as well as having the risk, of course, that some material portion of what the landlord is seeking is going to be paid, too. So, I think there's a reason for the parties to get over what has clearly been separating them for the last several months and try to resolve this. And I would really urge them to do so. If they think there is a basis for doing so that would be materially furthered by a mediator, I'm happy to appoint a mediator and direct mediation. There clearly are some very strong personalities here and I think that's on the client level, too, although maybe it's -- maybe strong may not be so much the word as frustrating and a mediator may be helpful there, including to deal with people at the client level. So, I would urge you all to consider

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that, too, and let me know about that.

Okay.

MR. TOFEL: Thank you, Your Honor.

MS. TRAKINSKI: Thank you, Judge.

(Whereupon this proceeding was  
concluded.)

(Time noted: 11:40 a.m.)

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C E R T I F I C A T I O N

I, Lisa Bar-Leib, hereby certify that the foregoing is a true and correct transcription, to the best of my ability, of the sound recorded proceedings submitted for transcription in the matter of the bankruptcy hearing for except, where as indicated, the Court has modified its bench ruling:

EAST 44TH REALTY, LLC.

I further certify that I am not employed by nor related to any party to this action.

In witness whereof, I hereby sign this date:

March 13, 2006.

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Lisa Bar-Leib